IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 271 OF 2004

Appasaheb Dinkar Pisal (deceased)
through L.Rs.& Ors... ... ... Appellants.

Versus

Anandrao Mahadeorao Pisal & Ors..... Respondents.

Mr. R. A. Thorat for the Appellants.

Mr. P. D. Dalvi with Mr. R. B. Nalavade
for Respondent No.1.

CORAM : A. S. OKA, J.

DATED : 21ST APRIL, 2005.

P.C.:

Heard learned Counsel appearing for the parties.

2. This second appeal is by original Defendant Nos.1 to 10. A suit for possession was filed by the original Plaintiffs on the basis of title. One of the plea raised by the Appellants in the written statement was that they are in adverse possession of the suit property from 3rd January, 1976. In so far as plea regarding perfection of title by adverse possession is

concerned, both the courts below are against the Appellants.

3. A decree for possession was passed by the trial Court. In the appeal preferred by the present Appellants in the first Appellate Court, the first point for determination was regarding plea of adverse possession and the second was regarding acquisition of ownership by the Appellants on the basis of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "the Act of 1947").

4. Shri Thorat, learned Counsel appearing for the Appellants, submitted that the original Plaintiffs applied to the Revenue Authority for possession of the suit property with the allegation that from January, 1976 the Appellants are in unauthorised possession of the suit property. He submitted that notwithstanding the subsequent suit filed by the Appellants for specific performance of the agreement for sale, the Appellants asserted their hostile possession way back in January, 1976. He has placed reliance on the decision of the Apex Court reported in 2004 A.I.R. SCW 5860 **(Tej Narain & Anr. v/s Shanti Swaroop Bohre**

& Anr.), A.I.R. 1981 SC 707 **(Kshitish Chandra Bose v/s Commissioner of Ranchi)** and A.I.R. 1973 SC 2537 **(Rajendar Singh & Ors. v/s Santa Singh & Ors.).** He submitted as the suit is governed by Article 65 of the Limitation Act, 1963, since there is assertion of hostile title by the Appellants from January, 1976 limitation will start from January, 1976 and the limitation will not stop merely because in 1978 suit for specific performance was filed by the Appellants. He, therefore, submitted that the view taken by the courts below is totally contrary to the law laid down by the Apex Court.

5. Shri Dalvi, learned Counsel appearing for Respondent No.1, supported the impugned judgment and order. He pointed out the findings recorded by the courts below on the plea of adverse possession.

6. I have considered the rival submissions. The Appellants filed a suit for specific performance in the year 1978 alleging that on 3rd January, 1976 the Respondent No.1 entered into the agreement for sale in respect of the suit property in favour of the Appellants. It is not in dispute that in the said suit the Appellants made out a case that they were put

in possession of the suit property in part performance of the agreement. It is not in dispute that the trial court dismissed the suit for specific performance. An Appeal was preferred by the Appellants to the District Court in the year 1983 which was dismissed on 5th April, 1986 and Second Appeal preferred by the Appellants in this Court has been dismissed in the year 1987. It is also not in dispute that a finding was recorded in the said suit for specific performance that the Appellants have failed to prove that they were put in possession of the suit property in part performance of the agreement dated 3rd January, 1976.

7. The suit is governed by Article 65 of the Limitation Act, 1963 and therefore the starting point of limitation will be the date on which the possession of the Appellants / Defendants became adverse. Shri Thorat has relied upon proceedings initiated by the original Plaintiffs before the Revenue Authority in January 1976 with the allegation that the Appellants have taken forcible possession of the suit property in January, 1976.

8. In so far as plea of adverse possession is concerned, in a recent decision of the Apex Court

reported in (2004) 10 SCC 779 **(Karnataka Board of Wakf v/s Government of India & Ors.)** the Apex Court held that a person pleading adverse possession has no equity in his favour and as he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. The Apex Court in paragraph 11 of the said decision held thus:

> "Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession *[Mahesh Chand Sharma*

(Dr.) V. Raj Kumari Sharma]."

9. It is true that the Appellants have pleaded that they were in hostile possession of the suit property from January, 1976. However, the said plea cannot be accepted for its face value. Fact remains that in 1978 a suit was filed by the Appellants in which they specifically claimed that they were put in possession in part performance of the agreement for sale. The Appellants not only prosecuted the suit but thereafter preferred an appeal in the first appellate court and after the appeal was dismissed, second appeal was filed in this court, which was dismissed in 1987. That is the reason why the appellate court has recorded a finding that till the decision of the second appeal on 9th March, 1987 it cannot be said that the Appellants were in hostile possession. The plea of the Appellants in the suit for specific performance was that their possession was referable to a lawful title, namely, title as a person in possession in part performance of agreement for sale. Thus the appellate court held that possession of the Appellants could not have been hostile possession at least till January, 1987.

10. In so far as decision of the Apex Court in Rajendra Singh **(Supra)** is concerned, it is true that once limitation start running, subsequent suit will not arrest the running of period of limitation. But in the facts of the case, the finding is that till the second appeal was dismissed in 1987 there could not be assertion of hostile possession by the Appellants.

11. Reliance placed by learned Counsel appearing for the Appellants on another judgment of the Apex Court in the case of Tej Narain (**(supra)** will not help the Appellants as their case of hostile possession from January, 1976 is not accepted by the courts below on the basis of case made out by the Appellants in suit for specific performance filed in the year 1978.

12. Reliance is placed on decision of the Apex Court in the case of Kshitish Chandra Bose **(Supra)**. In paragraph 8, the Apex Court held that in support of plea of adverse possession all that the law requires is that the possession must be open and without any attempt of concealment and it is not necessary that possession must be so effective so as to bring it to the knowledge of the owner. In view of assertion in the earlier suit that Appellants were put in

possession in part performance of the agreement for sale dated 3rd January, 1976, it cannot be said that from 3rd January 1976 the Appellants asserted hostile possession. Thus the appellate court is right when it was held that the possession of the Appellants could not have become hostile till March, 1987 i.e. till the date on which the second appeal arising out of the suit for specific performance was dismissed by this Court. Thus the suit filed by original Plaintiffs in the year 1989 cannot be held to be barred by Article 65 of the Limitation Act, 1963.

13. In so far as Certificate issued under Section 24 of the said Act of 1947 is concerned, it is brought to my notice that the Certificate was issued in the name of the father of the Appellant No.1 in the year 1976 when he had expired in the year 1967. In any case, in the earlier suit filed in the year 1978 the Appellants have never asserted that they acquired ownership on the basis of the said certificate.

14. No substantial question of law arises in this second appeal. There is no merit in this appeal. Second Appeal is accordingly dismissed with no order as to costs.

15. At this stage Shri Thorat, learned Counsel prays that the execution of the decree for possession be stayed for a reasonable time. The request is opposed by the learned Counsel appearing for Respondent No.1. Considering the facts and circumstances of the case, decree for possession shall not be executed till 17th June, 2005 subject to condition that the Appellants will not create any third party interests and will not part with possession of the suit property.

16. Parties to act on the authenticated copy of this order.

Sd/-

(A. S. OKA, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 275 OF 2004

IN

SECOND APPEAL NO. 271 OF 2004

Appasaheb Dinkar Pisal (deceased)
through L.Rs.& Ors... ... ... Appellants.

Versus

Anandrao Mahadeorao Pisal & Ors..... Respondents.

Mr. R. A. Thorat for the Appellants.

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for Respondent No.1.

CORAM : A. S. OKA, J.

DATED : 21ST APRIL, 2005.

P.C.:

In view of the order passed in the second appeal, this civil application does not survive. Hence rejected.

Sd/-

(A. S. OKA, J.)